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Supreme Court of the United States

OCTOBER TERM 1956

No. 356

BAY STATE CAFE INC.
AND
BRIGHAMS CAFE INC.,
Petitioners,

v.

LOUIS R. COHEN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS AND TO THE SUPERIOR COURT OF THE COMMONWEALTH OF MASSACHUSETTS

ANGUS M. MACNEIL
Counsel for the Petitioners
547 Somerville Avenue,
Somerville, Massachusetts

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Petitioners Bay State Cafe Inc. and Brighams Cafe Inc. jointly and severally pray that a writ of certiorari issue to review the judgment, decree and decision of the Superior Court of the Commonwealth of Massachusetts entered on July 7, 1954 and subject of a motion to vacate decided by the Supreme Judicial Court of the Commonwealth of Massachusetts on June 6, 1956.

Citation to Opinion Below

There was no opinion entered in the case below by the Supreme Judicial Court except as contained in the rescript annexed hereto. This rescript opinion will be included in 334 Mass. when issued. The advance sheet reference is page 833 of the Advance Sheets of 1956. There was no opinion from the Superior Court.

Jurisdiction

The decree of the Superior Court was entered on July 7, 1954 and almost immediately in accordance with the provisions of Massachusetts practice a motion to vacate said decree was filed on July 9, 1954. From adverse action by the Superior Court on this action the petitioner Bay State Cafe Inc. claimed an appeal. A second motion to vacate the Decree was also filed and heard by the Superior Court and from an adverse decision appeal was taken to the Supreme Judicial Court. These appeals were decided on June 6, 1956. Rehearing was denied on June 26, 1956 by the Supreme Judicial Court. As the decree was entered in the Superior Court the writ sought to be issued is addressed to said Court. As the decision of the Supreme Judicial Court does not contain any directions to the Superior Court as is usual in Massachusetts practice the writ is sought addressed to it either jointly or in the alternative. The Supreme Judicial Court being the highest Court to which recourse may be had and from which relief may be sought in the Commonwealth of Massachusetts. It appears that the decision of the Supreme Judicial Court may be considered as reaffirming the action of the Superior Court. The jurisdiction of the Supreme Court of the United States is invoked under Title 28 U.S.C. Section 1257 (3).

Procedure Below

The practice in Massachusetts Courts to obtain a vacation of a decree entered without hearing or by mistake or accident or where a final decree has been made . . . by reason of want of notice to him of the pendency of the suit is by motion for vacation of the decree. See *Hyde Park Savings Bank* v. *Davankoskas,* 298 Mass. 421, 424. See also *Clarke* v. *Andover,* 207 Mass. 91, 98. See also *Neafsey* v. *Chincolo,* 225 Mass. 12, 17, excerpts of which are shown on pp. 23, 28 of this petition. Therefore, while it appears at first glance that possibly the petition is being sought for relief from other than final judgment or decree; the laws of Massachusetts make the motion to vacate the final decree the proper procedure for review of the action of the court; The action on said motions to vacate the final decree final in itself and the decision of the Supreme Judicial Court on appeal from the actions on the motions are the final decisions obtainable in the Courts of Massachusetts. The entertainment by the Supreme Judicial Court of Massachusetts of the appeals from the denials of the motions to vacate the final decree constitutes a confirmation of the law and fact that the action on such a motion is a final judgment or final determination in itself for said Court can only consider reviews in Equity from the Superior Court upon final decrees and final determinations. The very act of the Supreme Judicial Court in reviewing the appeal from the denials of the motions to vacate the final decree was a confirmation of its decision that it had jurisdiction to so consider these matters as final determinations. See General Laws Chapter 214, Section 19 and Section 26. See page 16 of this petition for statutes.

How Was Federal Question Raised

The record shows that the federal question of denial of due process of law was raised by the motion to vacate the decree. See Record Appendix pp. 113 and 114. Also by affidavit accompanying said motion as required by rules of court Rule 46, Rules of Superior Court, copy of which appears on p. 29 of this petition, and said affidavit appears on p. 135 of record appendix. Also by the request made of the Court to take judicial notice of the facts concerning lack of due process in the entry of the decree in issue on pp. 120 to 123 of record appendix.

Question Presented

Whether the Superior Court and the Supreme Judicial Courts of the Commonwealth can legally enter final decrees and determinations of essential issues of fact without receiving evidence supporting said determinations and without granting to the parties the opportunity of submitting competent evidence upon these issues prior to such determinations and entering said determinations in the absence of evidence or other proof of facts and without opportunity to be heard thereon.

Constitutional Provisions and Statutes Applicable

The essential provisions of law involved in this consideration are Articles VI, cl. 2 of the Constitution of the United States and Amendment XIV of said Constitution. They are printed in Appendix A, p. 15.

Statement of the Case

There has never been any determination of the facts by the Court of the background of the case upon which the

final decree was entered. The claims of the parties prior to April 17, 1954 are set out in their respective pleadings shown on pages 1 and 5 of the record appendix. These are not repeated at this point as they do not appear material to the issues here presented to this court. The case as pleaded was set down for hearing before Judge Warner of the Superior Court shortly prior to April 17, 1954. At the said commencement of trial it was agreed that the parties may have been able to adjust their differences by themselves. This resulted in a stipulation made to the court and approved by it, and hearings were suspended until July 2, 1954, at which time or prior thereto the "parties will enter into a final consent decree . . .". See R. p. 10. Simultaneously with the drafting of the said stipulation the parties drafted two forms of final decree and executed them and entrusted them into the hands and custody of counsel for the defendant for safekeeping and for filing with the Court at such time as the obligations under the agreement p. 138 of Record Appendix were complied with. The plaintiff claims that all of the said obligations were complied with long prior to July 2, 1954 however there has never been any determination of the issue and no agreement of the parties on the point. This is the issue that the court was to hear on July 2, 1954 or prior thereto under the stipulation if the parties did not in fact agree. See R.A. p. 20 for stipulation.

On July 2, 1954 or prior thereto there was no hearing of the matter. Neither Counsel nor anyone representing the defendant appeared in court for hearing on July 2, 1954 in accordance with the stipulation. No action at said time, was taken by the Court. See docket record for these dates pp. 144 et seq of R.A. However, on July 6, 1954 completely without notice to or knowledge of the plaintiff the Counsel for the defendant presented to another judge of the Superior Court the form of decree favorable to his

client without in any way advising said judge of the circumstances of his possession of both forms. The said judge believed that form presented was in fact an assented to decree, having no knowledge of the conditions under which counsel for the defendant, was holding. On the presentation of it to the Court by the said counsel, he caused it to be entered as a final decree. Immediately upon learning of the misuse of the said form of decree by the counsel for the defendant, the plaintiff on July 9, 1954 filed a verified motion to vacate the said Decree with the Court who had entered it as a final decree two days previously. Said court immediately ordered the said motion to vacate the decree entered by him on July 7, 1954 set down for hearing as soon as possible and immediately entered a restraining order under prayers three and four of the said motion to vacate the said decree. See R.A. pp. 12 and 13. The granting of the restraining orders appear on page 19 of the R.A. lower half of page and (out of place in printing of Record Appendix). This restraining order was continued by orders of another judge of the Court on July 18, 1954. On July 19, 1954 the Court Lurie, Jr., not the Judge entering the said decree, held a hearing of the motion to vacate the said decree. He denied the motion stating orally that he was bound in the absence of allegations by the recitations in said motion set forth in the decree that the facts in the preamble to the decree were not in conformity with the truth. Setting out the claim he stated that inasmuch as the so called final decree contained the words "that the cause came on to be further heard, was argued by counsel, and by agreement of all parties and upon consideration thereof it is ordered adjudged and decreed etc." he was bound by them and could not go behind the recitation contained therein and was obliged to deny the motion. See R.A. p. 137 par. 3, which is uncontroverted by the Court or the defendant. It will be noted that the Judge denying the said motion failed to

comply with the obligations of making findings of material facts upon which his decision was based. However, another motion to vacate the said decree was filed with the Court by leave of court. The said motion was especially assigned for hearing for January 24, 1955. At this time the Court, the same judge who denied the previous motion to vacate the said decree refused to refer the matter on motion to the judge who entered the decree, Judge Swift, then available and sitting in the adjacent courtroom. This motion although referred to on p. 117 and recognized by the Court as such was denied but no record appears of it on the records of the Court see docket R.A. 144 et seq. He then proceeded to hear the motion. After having his attention called to those matters of which he was required by law to take judicial notice the Court excluded about all of the pertinent testimony offered, sua sponte. No objections were made by counsel for Cohen to the admission of most of the questions propounded. See R.A. p. 126, et seq.

The Plaintiff was denied the opportunity of offering competent evidence upon the motion to vacate the decree at said hearing. However the important relevant facts were offered in competent and undisputed form by the plaintiff and so received by the Court. See notice to admit facts, R.A. p. 114. See Affidavit under the rules of Court R.A. p. 135; see Pleadings R.A. p. 113; see Judicial Notice R.A. p. 120 et seq. Not a word was offered to controvert a single relevant allegation. Although the Court failed to comply with the provisions of statute GL C. 214, Sec. 23 by making written findings of fact nevertheless the facts are admitted by law in accordance with GL C. 231 Section 69. (P. 17) Copy set forth on pp. 114 et seq. of record. The Brighams Cafe Inc. filed a motion before the Supreme Judicial Court which was entertained by the Court for leave to file brief. This was denied thereby denying Brighams Cafe Inc. even an opportunity of hearing by argument alone.

Reasons for Granting of the Writ

1. The principal reason for granting the writ is the present practice of both the Superior Court and the Supreme Judicial Court of the Commonwealth of refusing to establish, as required by due process of law, pertinent facts upon which their decisions are made upon competent proof and the growing practice of attempting to determine rights of subjects of the Commonwealth without any basis in fact proven by evidence for such determinations. In the present case the rights of Bay State Cafe Inc. and of Brighams Cafe Inc. are being totally destroyed without even a chance to either of them to present to the court, entering the decree and causing the said destruction, the essential facts or testimony bearing out the claims of the Bay State Cafe Inc. and Brighams Cafe Inc. No opportunity has been given them to prove that the final decree entered without notice or hearing of any sort is improper and is not in accordance with the rights guaranteed of all subjects of this nation. At least the said petitioners should have had an opportunity to be heard before being destroyed.

2. The practice as aforesaid is not the extraordinary occurrence in the State Courts of Massachusetts. See certified or attested copies of proceedings in these courts on other cases recently. Attached hereto are records that indicate that

A) The Supreme Judicial Court for Suffolk County in case 68506 in an action by *State Realty Company* v. *Mac Neil Bros. Company*, has entered paper No. 4 a Restraining order; No. 9 an interlocutory injunction; No. 12, denial of motion for bond on issuance of temporary injunction; No. 18, denial of motion to modify or dissolve injunction; No. 19, denial of motion for orders subsequent to claim of appeal; No. 22, denial of motion to vacate injunction; No. 23, denial of motion to vacate injunction and dismiss

bill of complaint; No. 24, denial of motion for security for loss; No. 26, denial of motion to vacate injunction; No. 29, denial of motion to dissolve injunction or for furnishing security; No. 30, Final Decree, without a single word of proof of any material fact and without the opportunity of presenting a single word of evidence bearing upon the issues raised. The case proceeded through injunctions to final decree without a single opportunity to the respondent to be heard. See annexed attested copy of record dated July 6, 1956 tending to indicate that "upon request for Report of the testimony" as required by law the Court reported that "No evidence was taken". Subsequently a motion was filed with the said Supreme Judicial Court as shown by the annexed attested copy for ". . . Hearing of Motion to vacate injunction etc.". This motion presents to the Court the request for preservation of rights of the respondent in such form as would be difficult to misconstrue. The Court again by different judge denied said motion and thereby denied hearing of respondent's case again.

B) Another case is that of *Handy Cafe Inc.* v. *Hurley et ali* (Justices of the Superior Court) seeking to clarify the results and effect of many similar occurrences in the Superior Court wherein the rights of that petitioner were almost totally destroyed without the benefit of a hearing on the protection of said rights. See annexed attested copy of petition. A demurrer was filed to the petition which has not been disposed of as yet. But by demurrer the truth of the allegations is admitted. See paragraphs 8, 9, and 10 of the petition. Again actions of court without evidence or proof of fact are destroying property of litigants.

C) Another case; one in the Superior Court; *Cohen* v. *Bay State Cafe Inc.; Martin Edward Inc. et al.* The Court entered injunctions depriving Martin Edward Inc. of its place of business, without hearing or evidence or proof of any relevant fact. Upon motion to revoke said injunction

the Court refused to permit the Martin Edward Inc. to submit any proof of its contentions and claims contained in its motions for revocation of injunction. The said corporation in accordance with provisions of law requested findings of material facts upon which the Court predicated its action in denying revocation of said injunction. This the court could not do for the reason that it was acting without basis of fact and so recorded; "the request was dismissed as no evidence was introduced."

As the objections of the parties to the arbitrary actions of these courts in making essential determinations without evidence or proof or agreement of facts there appears but one recourse left, that is by application to the Supreme Court of the United States for its assistance in obtaining without reserve the observance of the due process clauses of the Supreme Law of our Land, those in the Constitution of the United States.

While the practice of issuing injunctions and other decisions and orders even final determinations and decrees without the reception and consideration of evidence has continued for some considerable period it is extremely difficult to so prepare a proper case for presentation to the Supreme Court of the United States for most of said determinations are pertinent to interlocutory matters and by the time that the final decrees are entered and become conclusive the occasion for the continuance of interlocutory decree has passed and therefore the question has become moot in the particular case and review out of order. However the condition continues unabated. Therefore application is made for review by the Supreme Court of the United States in the present case for the issue has not become moot therein.

In the present case the decree was entered without evidence or proof of any kind. The decree is still on the records, and being enforced by the Courts of Massachusetts.

The Courts with full knowledge of entry of the decree without hearing refuse to grant that right of hearing upon notice required by all courts of all recognized jurisdictions.

4.) The court in its opinion held that the "Upon an appeal with a transcript of the evidence but without any report of material facts, the entry of the decree imports the finding of every fact necessary to support the decree." These words are followed by citations to cases in 313 Mass. and 321 Mass. But the essential statements contained in these cases are omitted from the present case. In the case of *Slater* v. *Munroe,* 313 Mass. 538, 540, appear the words, "The entry of the decree implies a finding of every fact, *permissible on the evidence,* necessary to support the conclusion of the trial judge." Italics ours. In the case of *Marlowe* v. *O'Brien,* 321 Mass. 384 appear the words "Since the judge made no report of the material facts, the entry of the decree imported a finding of every fact essential to sustain it and within the scope of the pleadings. (citations) The evidence, which is mainly oral has been reported. *From an examination of it, we are of the opinion that it fully supports the decree.*" The development away from decisions by the Supreme Judicial Court upon the evidence submitted is obvious. In the first case quoted the court ruled that the findings if supported by evidence are to stand. The second case quoted and decided four years after the prior case in 1943 weakens the statement considerably but still makes the evidence of importance in the decisions of the Supreme Judicial Court. The general statement is made and then substantiation is added later. Now in the case at Bar the Supreme Judicial Court has gone a step further from the essentials of just determinations and has left the requirement for consideration of evidence completely. The Court has examined the evidence but refrained from using it as a justification for decision. It

stops at the mere statement that it examined the evidence. Whether or not the evidence justifies the action of the Court is left in question by the opinion. However the record leaves no question. There is not the slightest suggestion that the decree was entered while the court was respecting the rights of Bay State Cafe Inc. and Brighams Cafe Inc. to determinations by due process of law. The evidence clearly shows, as well as the record itself, by admissions and uncontroverted affidavit that the decree in question was entered without the granting to Bay State Cafe Inc. or Brighams Cafe Inc. of their rights to notice of hearing and an opportunity to be heard upon the entry of any decree.

The decision based solely upon the implication of findings by the trial judge that the decree was warranted by the breach of the written agreement of April 17, 1954 is strange for as all of the evidence is reported and there is not a word contained therein that the court entering the decree ever had the slightest knowledge of whether there was a breach or not and the issue has never been before a court for determination since. The Court on the first motion did not and could not act upon such determination for he was bound by the statements of the preamble to the decree. The issue was never contested in the second motion. At the first motion the Court could not fairly hear such issue as the decree was already entered. The issue was not whether or not the decree was in proper form or substance but whether or not the plaintiff was to be given an opportunity to be heard upon its entry. To attempt to convert such a hearing into a justification of the implied finding that the agreement of April 17, 1954 had been breached without such an actual finding is illegal and the serious question remains if such a finding could be had on any evidence unless and until the decree already entered

had been vacated and a hearing held upon entry of a proper final decree.

It does not seem quite the way of deciding cases in our nation, to imply findings not supported by evidence in proceedings wherein the very issues are not raised and in proceedings in which they cannot properly be determined. Nor does it appear to be our way of doing things to condemn a party and then ask him to prove that the condemnation was improper. It seems that the opportunity must be given him to speak before the adjudication is made. If he had an opportunity to speak first and neglected so to do the situation might be different, but in the complete lack of opportunity to speak first the adjudication should be vacated and hearings held after reasonable notice before prejudicing a parties interests.

The following words from *Windsor* v. *McVeigh*, 93 U.S. 274, 280 appear consequential, "It is a rule . . . founded in the first principles of natural justice that a party shall have an opportunity to be heard in his defense before his property is condemned and that the charges on which the condemnation is sought shall be specific determinate and clear. . . . If a seizure is made . . . without an opportunity of appearing and making a defence . . . the sentence is not so much a judicial sentence as an arbitrary sovereign edict. . . . It amounts to little more, in common sense and common honesty, than a sentence of the tribunal which first punishes and then hears the parties, *castigatque, auditque* . . . it ought to have no binding obligation upon the rights or property . . . and is but a solemn fraud, if it is clothed with all the forms of a judicial proceeding."

While the Supreme Judicial Court rests its decision upon the lack of findings of material facts and the adverse implications from such lack it fails to comment upon the requirements of the trial court to make such findings of material facts upon requests being timely made therefore

and its failure so to do. An inspection of the docket record R.A. p. 147 and item 26 contained thereon. The right to such findings of material facts is guaranteed to a party requesting them within ten days of decision. The request here was made the same day of decision in ample time for compliance with statute. Yet the court failed to comply with the provisions of statute. See p. 19, G.L. C. 214, Sec. 23. For this the Supreme Judicial Court is impliedly penalizing the plaintiff which strictly complied with its obligations and recognized procedures.

For U. S. Supreme Court decisions on requisites of due process see cases cited pages 23 et seq.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

Angus M. MacNeil
Counsel for the Petitioner

August 10, 1956

Appendix A

Title 28 U.S.C. Sec. 1257 (3)

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the grounds of its being repugnant to the Constitution treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or Statutes of or commission held or authority exercised under, the United States.

United States Constitution Article VI cl. 2

This Constitution and the Laws of the United States which shall be made in pursuance thereof; and all treaties made or which shall be made, under the Authority of the United States shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

Amendment 14 section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any

person within its jurisdiction the equal protection of the laws.

General Laws Chapter 214 Sec. 19

Appeal from Final Decree, A party aggrieved by the final decree of a justice of the Supreme Judicial Court or a final decree of the Superior Court may within twenty days after the entry thereof, appeal therefrom. An appeal from a final decree of a justice of the supreme judicial court shall be entered on the docket of that court and an appeal from a final decree of the Superior Court shall be entered in the Supreme Judicial Court. The completion of an appeal hereunder shall be governed by section one hundred and thirty-five of chapter two hundred and thirty-one. When such appeals have been entered as aforesaid all proceedings under such decree shall be stayed, and the cause shall thereupon be pending before the full court, which shall hear and determine the same, and affirm, reverse or modify the decree appealed from. Upon the reversal of a final decree, the court may remand the cause to a justice of the Supreme Judicial Court or to the Superior Court, with necessary and proper directions for further proceedings therein.

General Laws chapter 214 section 26

26 Interlocutory decree Appeal from a party aggrieved by an interlocutory decree of a justice of either court may, in like manner, appeal to the full court; but the appeal shall not suspend the execution of such decree, except as provided in section twenty-two, nor transfer to the full court the entire cause or any matter therein except the question whether the interlocutory decree appealed from shall be affirmed, reversed or modified.

General Laws chapter 231 section 69

Demand for admission of facts or of execution of paper

In any action at law or suit in equity a party by written demand filed in the clerk's office and notice given by copy thereof by registered mail, return receipt requested, to the other party or his attorney, not less than ten days before trial of the action or suit, may call upon the other party to admit for the purposes of the case only, any material fact or facts or the execution of any material paper or document which the party filing the demand intends to use at the trial. Copies of the papers or documents shall be delivered with the demand unless copies have already been furnished. An affidavit of such notice and the return receipt, if any, shall forthwith be filed in the clerk's office. The Court may delay the trial until such demand is answered and on motion before trial may strike out of such demand or any answer filed in response thereto any matter which is irrelevant, immaterial or improperly concluded therein. After the filing of said affidavit of notice each of the matters of which an admission is demanded shall be deemed admitted unless within ten days after mailing the demand, or within such further time as the Court may allow on motion and notice, the party to whom the demand is directed files in the clerk's office a sworn statement either denying specifically the matters of which an admission is demanded or setting forth in detail the reasons why he cannot truthfully either admit or deny those matters. Any admission made by a party by answering or not answering such demand is for the purpose of the pending proceeding only and neither constitutes an admission by him for any other purpose nor may be used against him in any other proceeding, but said admission shall be binding upon him in the pending proceeding unless he is relieved therefrom

by the court for cause shown. If the party upon whom such demand is made refuses to admit any fact or the execution of any paper or document mentioned in the demand, the reasonable expense of proving such fact or the execution of such paper or document, as determined after summary hearing by the justice presiding at the trial, shall, unless the justice certifies that the refusal to admit was reasonable, be paid by said party to the other party and the amount thereof shall be added to the taxable costs of the party in whose favor such amount is awarded or deducted from the amount of any judgment or decree against him.

General Laws chapter 214 section 24

Report of Testimony upon appeal; Diminution of evidence and of record

Upon an appeal, the testimony of witnesses who have been examined orally before a justice of either court shall, at the request of any party, be reported to the full court. The Courts shall provide by general rules for some convenient and effectual means of having the same reported by the justice by whom the case is heard or by a person designated by him for that purpose. Except as provided in section one hundred and twenty-five of chapter two hundred and thirty-one, no oral evidence shall be exhibited to the full court, but the cause shall be heard on appeal upon the same evidence as on the original hearing. The Supreme Judicial Court may by rule authorize and regulate the diminution or abbreviation of the evidence and of the record to such parts thereof as are really pertinent to the true issues involved in an appeal.

General Laws chapter 211 Section 8

Judgment or Rescript after decision

The full court shall as soon as may be after the decision of the questions submitted to it, make and enter a proper order, direction, judgment or decree for the further disposition of the case, or cause a rescript, containing a brief statement of the grounds and reasons of the decision to be filed therein, or it may by writ of certiorari or other proper process remove the record of the case, or order it to be removed, into the Supreme Judicial Court, there enter judgment and remand the record to the court from which it was removed to carry such judgment into effect, or instead thereof, the full court may order a new trial or further proceedings at the bar of the Supreme Judicial Court or order sentence to be awarded or execution issued in said court.

General Laws chapter 214 section 23

Report of Material Facts; Request for action on Rulings of Law; Exceptions

The Justice of either Court (Supreme Judicial or Superior) by whom a decree was made if a written request by any party entitled to appeal therefrom is filed in the office of the clerk of such court within ten days after such party has been notified of the entry of the decree, shall report the material facts found by him within thirty days after the filing of the request aforesaid or within such further time as the chief justice of such court may grant, upon written request by such justice within the said thirty day period provided that where such decree is entered upon an order made by a justice other than the one enter-

ing the decree, such other justice shall make the report of material facts requested under this section. If no request for a report of material facts is so filed, such report shall be in the discretion of the justice. Such a request may be accompanied by a request for action on rulings of law duly filed during the trial and in case of such additional request exceptions may be taken to any rulings or refusals to rule thereon within ten days after notice of the action of the court thereon and a request for action on such requested rulings may be made also within ten days after notice of a report of material facts made by the Court in its discretion without previous request and exceptions may be taken as aforesaid within ten days after notice of the action of the Court. In either case the filing of such requests after trial for action on rulings of law shall constitute a waiver of the right of appeal under section nineteen. In case exceptions are taken as herein provided, section one hundred and twenty-two and one hundred and twenty-three of chapter two hundred and thirty-one shall be applicable.

Appendix B

OPINION BELOW.

June 6, 1956.

(*Statement of the Grounds and reasons of the decision*:)

During the course of a hearing on a bill in equity brought by the plaintiff, which was holding certain premises in Boston as assignee of a lease, to prevent the defendant owner from evicting it, the parties agreed in a writing dated April 17, 1954, to settle their controversy, and two instruments in the form of final decrees and bearing the assent of all parties in interest were left with counsel for the defendant; one favorable to the plaintiff and requiring reinstatement of the lease was to be entered if certain things according to the written agreement of April 17, 1954, were performed by the plaintiff by July 2, 1954, otherwise the decree terminating the lease and dismissing the bill was to be entered. Counsel for the defendant caused the latter decree to be entered on July 7, 1954. The plaintiff on July 9, 1954, filed a motion to vacate this decree and after a denial of this motion he filed a second motion on October 29, 1954, to vacate the decree of July 7, 1954. The plaintiff has appealed from a decree denying his motion of July 9, 1954. He has also excepted and appealed from the denial of his motion of October 29, 1954. No exceptions were perfected. We assume in favor of the plaintiff, without deciding, that these appeals are properly here, see *Carilli* v. *Hersey*, 303 Mass. 82, 86-87, because in any event the ultimate decision must be against the plaintiff. *Commonwealth* v. *McHugh*, 326 Mass. 249, 275. We have examined the evidence. The case comes within the familiar rule that, upon an ap-

peal with a transcript of evidence but without any report of the material facts, the entry of a decree imports the finding of every fact necessary to support the decree, *Slater* v. *Munroe,* 313 Mass. 538, 540; *Marlowe* v. *O'Brien,* 321 Mass. 384, including the implied finding that the entry of the decree on July 7, 1954, was warranted by breach of the written agreement by the plaintiff of April 17, 1954. There was no error in the denial of the motions and the decision of the court must be affirmed.

Appendix C

CONFLICTING DECISIONS.

Tindal v. *Wesley*, 167 U.S. 204, 217.

"No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the Government from the highest to the lowest are creatures of the law and are bound to obey it." Again, "Shall it be said in the face of all this and of the acknowledged right of the judiciary to decide in proper cases statutes which have been passed by both branches of Congress and approved by the President to be unconstitutional, that the courts cannot give a remedy when the citizen has been deprived of his property by force, his estate seized and converted to the use of the Government without lawful authority without due process of law and without compensation because the president has ordered it and his officers are in possession? If such be the law of this country it sanctions tyranny which has no existence in the monarchies of Europe nor in any other Government which has a just claim to be well regulated liberty and the protection of personal rights.

"Any other view leads to this result; That if a State by its officers acting under a void statute should seize for public use the property of a citizen without making or securing just compensation for him and thus violate the constitutional provision declaring that no State shall deprive any person of property without due process of law. *C.B. & Q. R.R.* v. *Chicago*, 166 U.S. 226, 236, 241 the citizen is remediless so long as the State by its agents chooses to hold his property."

Hyde Park Savings Bank v. *Davankoskas,* 298 Mass. 421, 423.

Cases of accident or mistake whereby a party failed, at one stage of the proceedings or another, to obtain his day in court, were redressed in a more simple and summary manner upon mere motion in the cause. In *Thompson* v. *Goulding,* 5 Allen 81, 82, after stating the general rule that a final decree in equity can be modified only by bill of review, Bigelow, C.J. said "Cases do not come within it where some clerical errors, mistakes in computation or irregularities in making up the record have occurred, or where a final decree has been made on default of a party through the negligence of his solicitor, or by reason of want of notice to him of the pendency of the suit." *Sullivan* v. *Sullivan* and cases cited. "This power to set aside a final decree on motion because of accident or mistake was established very early. It is not limited to the instances enumerated by Bigelow, C.J. in the passage quoted, but extends to other cases analogous in principle. For example, a final decree entered after full hearing has been set aside where the decree was entered at an unusual time to the surprise and prejudice of a party. Cases cited . . . In *Kemp* v. *Squire,* 1 Ves Sr. 205 and *Robson* v. *Cranwell,* 1 Dick. Ch. 61, it was a plaintiff who obtained the setting aside of a decree entered through the neglect of his solicitor, not a defaulted defendant. In *Benson* v. *Vernon,* 3 Bro. Parl, Cas 626, a decree was set aside because of the excusable failure of a party to take steps to defend, without any negligence or mistake of any solicitor." The true remedy of the plaintiff was not by bill of review but by motion in the original suit to set aside the final decree and reopen the case."

Shelley v. *Kraemer,* 334 U.S. 1, 20

State Action as that phrase is understood for the purposes of the fourteenth amendment refers to exertions of State power in all forms. And when the effect of that action is to deny rights subject to the protection of the Fourteenth Amendment, it is the obligation of this Court to enforce constitutional commands." . . . "And it would appear beyond question that the power of the State to create and enforce property interests must be exercised within the boundaries defined by the Fourteenth amendment." *Shelley* v. *Kraemer,* 334 U.S. 1. 22." Where however it is clear that the action of the State violates the terms of the fundamental charter it is the obligation of this Court so to declare". at 23.

Windsor v. *McVeigh,* 93 U.S. 274, 277.

The principle stated in terse language lies at the foundation of all well ordered systems of jurisprudence. Wherever one is assailed in his person or his property there he may defend, for the liability and the right are inseparable. This is a principle of natural justice recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard is not a judicial determination of his rights and is not entitled to respect in any other tribunal. . . . Until notice is given the court has no jurisdiction in any case to proceed to judgment whatever its authority may be by the laws of its organization over the subject matter. . . . In the present case the District Court not only in effect said this but immediately added a decree of condemnation reciting that the default of all persons had been duly entered. It is difficult to speak of a decree thus rendered with modera-

tion; it was in fact a mere arbitrary edict, clothed in the form of a judicial sentence. The right (to notice and appearance) must be recognized and its exercise allowed before the court can proceed beyond the seizure to judgment. . . . In another part of the same opinion the judge (*Bradstreet* v. *Neptune Insurance Co.*, 2 Sumn 601) characterized such sentences "as mere mockeries and as in no just sense judicial proceedings," and declared that they ought to be deemed, both ex directo in rem and collaterally, to be mere arbitrary edicts or substantial frauds. . . . "A proceeding" continued the Court, "professing to determine the right of property, where no notice is given written or constructive, whatever else it might be called, would not be entitled to be dignified with the name of a judicial proceeding. It would be a more arbitrary edict not to be regarded anywhere as the judgment of a court."

Brinkerhoff Faris Co. v. *Hill*, 281 U.S. 673, 681

We are not now concerned with the rights of the plaintiff on the merits, although it may be observed that the plaintiffs claim is one arising under the Federal Constitution and consequently one on which the opinion of the State Court is not final; or with the accuracy of the State Courts construction of the statute in either the *Laclede* case or the case at bar. Our present concern is solely with the question whether the plaintiff has been accorded due process in the primary sense whether it has had an opportunity to present its case and be heard in its support. Undoubtedly the State Court had the power to construe the statute dealing with the State Tax Commission and to reexamine the *Laclede* case. Neither of these matters raises a federal question, neither is subject to our review. But while it is for the State Courts to determine the adjective as well as the substantive law of the State, they must,

in doing so accord the parties due process of law. Whether acting through its judiciary or through its legislature a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy unless there is or was afforded to him some real opportunity to protect it.

Again, "It is plain that the practical effect of the judgment of the Missouri Court is to deprive the plaintiff of property without affording it at any time an opportunity to be heard in its defense."

Hovey v. *Elliott,* 167 U.S. 409, 418

Perhaps no definition is more often quoted than that given by Mr. Webster in the Dartmouth College case; "By the law of the land is most clearly intended the general law; a law which hears before it condemns, which proceeds upon inquiry and renders judgment only after trial. The meaning is that every citizen shall hold his life, property and immunities under the protection of the general rules which govern society". And that the judicial department of the government is in the nature of things necessarily governed in the exercise of its functions by the rule of due process of law is well illustrated by another observation of Judge Cooley immediately following the language just quoted saying: The definition here given is apt and suitable as applied to judicial proceedings which cannot be valid unless they proceed upon inquiry and "render judgment only after trial".

At page 416, "A party has a right to be heard for the purpose of explaining his conduct; he has a right to call witnesses for the purpose of removing the impression made upon the mind of the bishop, he has the right to be heard in his own defense. On consideration then it appears to me that if the requisition of the bishop is to be considered

a judgment it is against every principle of justice that a judgment should be pronounced not only without giving the party an opportunity of adducing evidence but without giving him notice of the intention of the judge to proceed to pronounce the judgment".

Even the Magna Carta, "No man shall be dissesed etc. unless it be by the lawful judgment; that is by verdict of his equals (That is of men of his own condition) or by the law of the land (that is to speak it once and for all) by the due course and process of law."

Clarke v. *Andover,* 207 Mass. 91, 98.

"The other case is an appeal from a decree of the probate court dismissing a petition to vacate the decree appointing Harry M. Eames a trustee under the will of Benjamin H. Punchard, to receive the money in the hands of Frances S. Clarke, executrix of the will of Anasa Clarke, a former trustee. It appears that the appointment was made without notice to any of the parties who are now found to be interested in the fund, notice having been given only to the Attorney General and the officers of the Town of Andover. The statute applicable to such cases requires that notice of the proceedings for the appointment shall be given to all persons interested. (citations) The decree of appointment was made without authority, and the petition to vacate it should have been granted (citations) Since the Probate Court is now a court of Superior and General jurisdiction . . . the irregular appointment of Mr. Eames as trustee must be corrected in that court and previous decisions to the contrary are no longer applicable."

Neafsey v. *Choncolo*, 225 Mass. 12, 17

"In dismissing the present petition the probate court based its action on the presumption in favor of proceedings on which the above recital was based. See R.L. c. 162 P2. Where there is no evidence to the contrary, that presumption well may control, especially when an attempt is made to attack a decree collaterally. *McCooey* v. *N.Y. N.H. & H. R.R.*, 182 Mass. 205. But here the petitioners properly have brought proceedings directly to vacate the decree, so far as their interests are concerned, on the ground that the court had no authority to enter it. See *Clarke* v. *Andover*, 207 Mass. 91. They may prove that the recital in the decree that a guardian was appointed "for all minors interested and to represent any future contingent interests which would arise under said will" is not true in fact, and that they were not served with process or represented in the proceedings. This jurisdictional fact can and ought to be established by evidence and not left to a mere presumption, especially now that the estate has been settled and third persons have dealt with the real estate in good faith in reliance upon that decree. In these circumstances we are of opinion that there should be a specific finding on the question whether in fact a guardian was appointed to represent future contingent interests in the proceedings for leave to compromise the will; that the case should stand for further hearing. *Rubenstein* v. *Lottow*, 220 Mass. 156, 164.

Excerpt from Rule 46 of Superior Court Rules.

"The Court need not hear any motion or opposition thereto, grounded on facts, unless the facts are verified by affidavit or are apparent upon the record and files or are agreed and stated in writing signed by the attorneys for the parties interested."